Mississippi Public Defenders Conference

Spring 2016

APPELLATE COURT UPDATE

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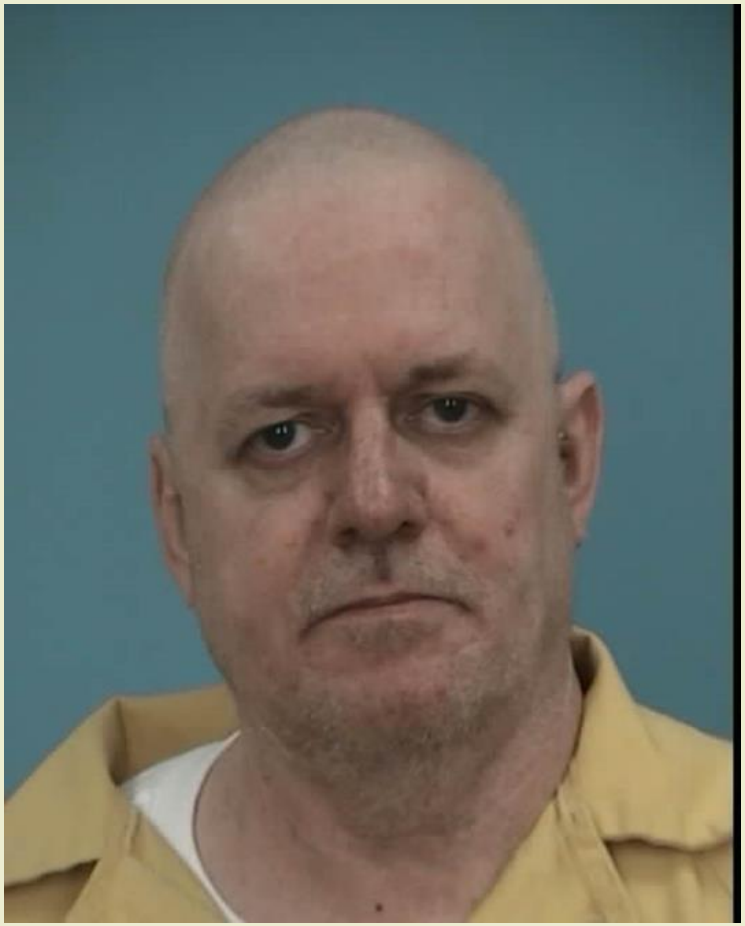
UNITED STATES SUPREME COURT CASES

SCOTUS Cases

- ***Hurst v. Florida***, 136 S.Ct. 616 (January 12, 2016) – Judge cannot sentence defendant to death where a jury is not required to make findings on aggravation.
- ***Kansas v. Carr***, 136 S.Ct. 633 (January 20, 2016) - Jury need not be affirmatively instructed that mitigation evidence does not need to be found beyond a reasonable doubt – co-defendants in death penalty sentencing proceedings can be tried together.
- ***Montgomery v. Louisiana***, 136 S.Ct. 718 (January 25, 2016) - *Miller v. Alabama* is retroactive (even though it already was in Mississippi).
- ***Caetano v. Massachusetts***, 136 S.Ct. 1027 (March 21, 2016) - stun-guns are protected under the Second Amendment.
- ***Luis v. United States***, 136 S.Ct. 1083 (March 30, 2016) - pretrial freeze of a criminal defendant's legitimate, untainted assets violates the Sixth Amendment right to counsel of choice.

MISSISSIPPI SUPREME COURT CASES

Brown v. State, 178 So.3d 1234 (Miss. November 12, 2015)



Brown v. State, 178 So.3d 1234 (Miss. November 12, 2015)

- Brown was the attorney for a guardian. Over a million dollars from the ward's inheritance was deposited into Brown's attorney escrow account.

- Brown wrote several checks from his escrow account, indicating that the guardianship was the lender. He bought several cars as well.

Brown (cont.)

- Brown was charged and convicted of embezzlement.
- Brown argued on appeal that he was not guilty of embezzlement, because none of the conversion to his "own use" was for his benefit. At most, he contended, he was guilty of malpractice.
- The MSSC upheld the conviction.

Brown (cont.)

- The "original embezzlement deprives the victim of the right to *direct and control* his own property as the *owner*, not the embezzler, sees fit, even if the embezzlement ultimately turned a profit for the victim." [emphasis supplied].

- Brown deposited some guardianship funds into his escrow account, and that he never moved them from his escrow account to a guardianship account. Since Brown directed and controlled the disposition of the money, he applied it to his own use.

Burgess v. State, 178 So.3d 1266 (November 19, 2015)

Burgess v. State, 178 So.3d 1266 (November 19, 2015)

- Ever the family man, after celebrating their 12th Anniversary, Burgess left his wife and three young daughters for a week-long drug and alcohol binge.

- He came home, found his wife sleeping in their children's bedroom, told her to go to the master bedroom, choked her, threatened her, and sexually assaulted her.

Burgess

- Burgess was indicted under §97-3-95(1)(a), which prohibits “sexual penetration with another person without his or her consent.”

- His indictment tracked the language of the statute when it asserted that Burgess "engage[d] in sexual penetration . . . with S.B. . . . by inserting his penis in S.B.'s [vagina, anus, and mouth], without her consent[.]"

- Force is not a necessary element of that charge.

Burgess

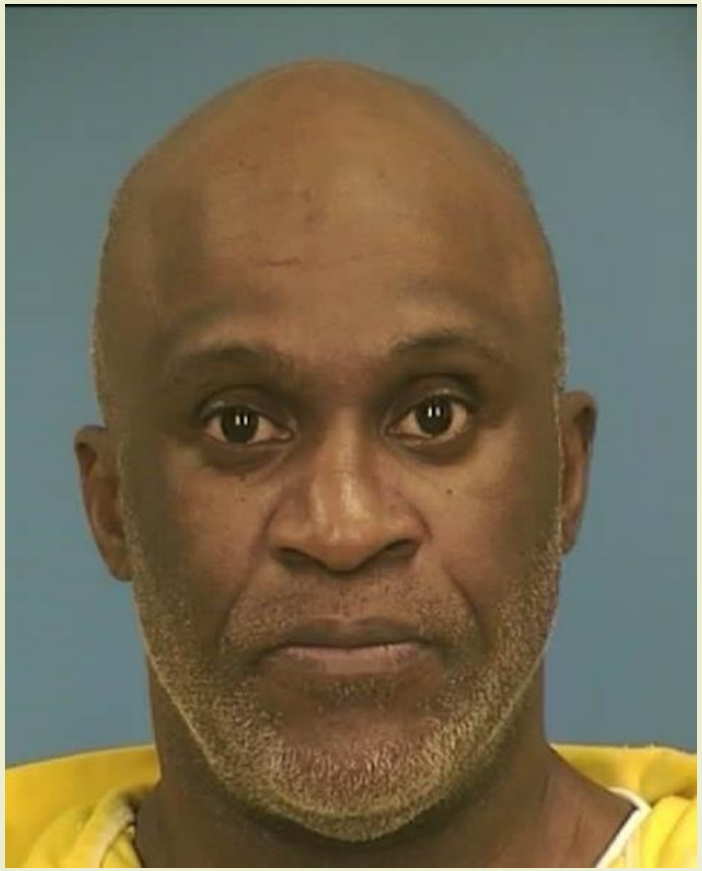
- However, Burgess alleged that since the victim was his legal wife, force was necessary in order to be convicted of sexual battery.

- Section 97-3-99 states a legal spouse of an alleged victim may be found guilty of sexual battery “if the legal spouse engaged in forcible sexual penetration” without consent. Burgess argued that including force in the jury instructions improperly amended the indictment.

Burgess

- "We hold that force is not an element of sexual battery…We further hold that marriage can be an affirmative defense to sexual battery, yet it is not an absolute defense. Once the defense of marriage is raised, it will apply, unless the State proves beyond a reasonable doubt that the two were separated or living apart at the time of the attack or that force was involved…Proof of force negates the affirmative defense."

Anderson v. State, 185 So.3d 966 (November 19, 2015)



Anderson v. State, 185 So.3d 966 (November 19, 2015)

- Anderson got into an altercation outside of a convenience store. He ended up and shooting and killing another man, and fleeing the scene.
- At trial, Anderson asserted self-defense.
- The trial judge granted the State's flight instruction.

Anderson

- The MSSC held that no evidence was introduced to support the assertion that Anderson's flight was caused by something other than consciousness of guilt.

- Anderson never testified he left the scene because he was worried about retaliation. The trial court determined the evidence of Anderson's flight it was probative and did not err in allowing the jury to consider it.

Anderson

- Justice Dickinson dissented, arguing that the MSSC supreme court should abolish flight instructions.

Nuckolls v. State, 179 So.3d 1046 (December 10, 2015)

This is a Oct. 25, 2011 booking photograph released by the Mississippi County Sheriff's Department and taken in Luxora, Ark., of Sam Nuckolls, 33, who has been charged with felony counts of voyeurism in Mississippi and Arkansas and police in Texas also are investigating. Authorities in the three states are investigating the traveling Baptist minister they say is suspected of making secret videos of women in bathrooms. (AP Photo/Mississippi County Sheriff's Department)

Nuckolls v. State, 179 So.3d 1046 (December 10, 2015)

- Nuckolls was charged with secretly filming and videotaping women in his bathroom on thirteen occasions. When Nuckolls moved to dismiss most of the counts because they had occurred outside the two-year statute of limitations, the State obtained an amended indictment, adding language charging that Nuckolls "otherwise reproduced" the images within the statute of limitations by saving them on his computer.

- Nuckolls then waived his right to a trial by jury, and the parties submitted an agreed stipulation of facts to the circuit judge, asking the circuit judge to decide the case based on that stipulation.

- Based on the stipulation of facts, the circuit judge convicted Nuckolls on all thirteen counts. Nuckolls appealed all of his convictions except for counts three and four.

Nuckolls

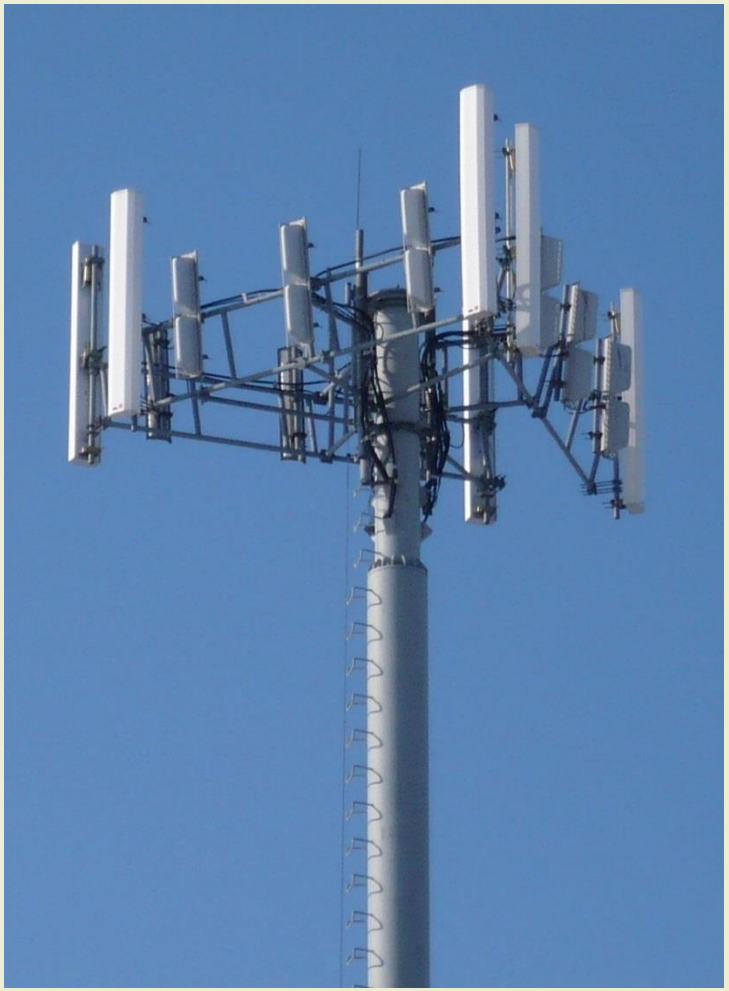
- The stipulation omitted any reference to where ten of the thirteen counts took place. Since the State failed to prove venue as to those ten counts, they are reversed.

- To imply, as the State suggested, that the transfers occurred in DeSoto County simply because Nuckolls resided there, is insufficient.

- Although the stipulation stated the filming occurred in Nuckolls's bathroom, there is no information on where the transferring to the laptop took place. The filming took place outside the statute of limitations, so the transfer to the computer must have taken place some time after the filming. Venue was adequately raised at trial when counsel argued the State failed to prove where the transfer took place.

Fleming v. State, 179 So.3d 1115 (December 17, 2015)

- Cell phone records presented at trial placed Fleming in the same area as the murder, shortly before the murder occurred.



Fleming

- The State used an AT&T engineer to introduce the cell phone records, but did not tender him as an expert. The trial court denied a continuance for Fleming to consult his own expert about the cell phone records.

- The COA originally found the trial judge did not abuse his discretion in admitting the AT&T engineer's testimony as a lay witness and denying Fleming's request for a continuance.

Fleming

- The COA said that there was no problem with the cell phone tower testimony. After the COA issued its opinion, the SCT decided *Collins v. State*, 172 So. 3d 724 (Miss. 2015), which held that "testimony that goes beyond the simple descriptions of cell phone basics, specifically testimony that purports to pinpoint the general area in which the cell phone user was located based on historical cellular data, requires scientific, technical, or other specialized knowledge that requires expert testimony.

- The AT&T engineer's testimony crossed the line into expert testimony under *Collins*, and it exceeded the information contained in the phone records.

- So the circuit judge and the Court of Appeals erred by concluding that [the AT&T engineer] provided no expert testimony, and that the State's disclosure of the phone records in March 2013 provided sufficient notice of the State's intent to use expert testimony to establish Fleming's whereabouts at the time of the murder. Because the State ambushed Fleming with this expert testimony shortly before trial, his request for a continuance to consult with an expert of his own should have been granted.

Atwood v. State, 183 So.3d 843 (January 14, 2016)

Atwood v. State, 183 So.3d 843 (January 14, 2016)

- Concerns the separation of powers argument that many circuit judges were making regarding revocations after HB 585.

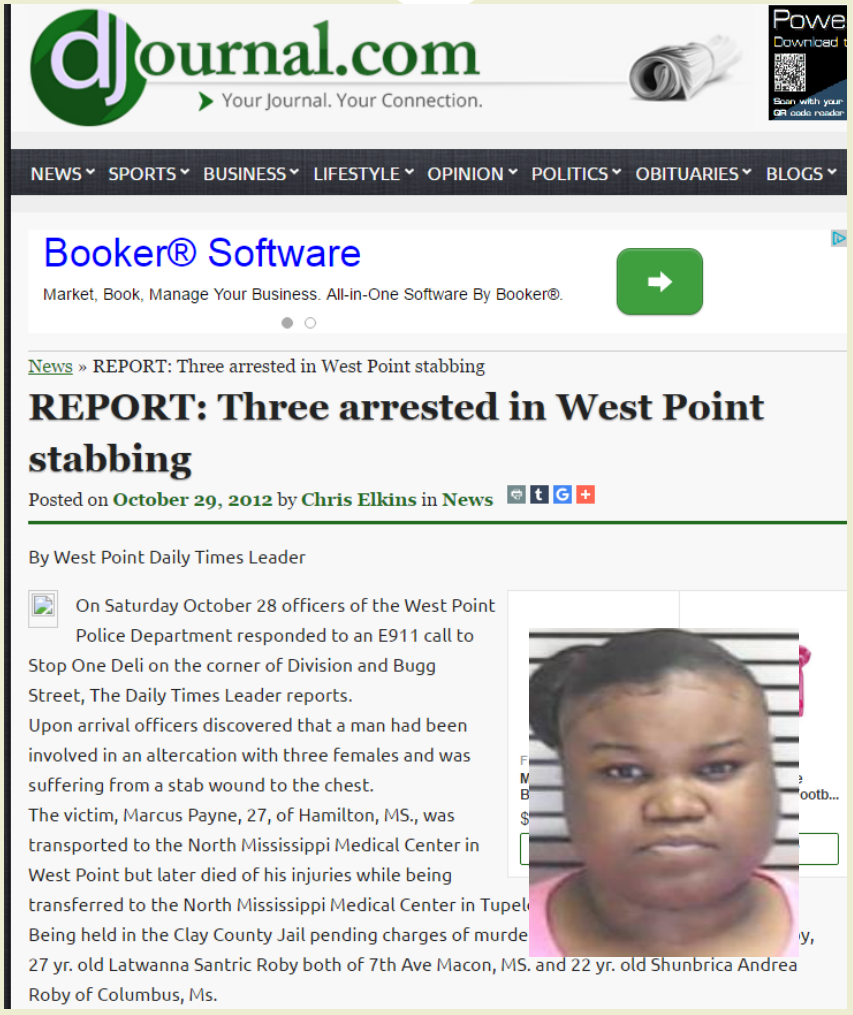
- Prior to HB 585, §47-7-37 authorized a circuit court to punish a violation of the conditions of post-release supervision by "impos[ing] any part of the sentence which might have been imposed a the time of conviction." The 2014 amendments to the statute provided for graduated penalties for "technical violations."

Atwood (cont.)

- "[W]e find nothing in the amendments that impinge upon a trial court's ability to enforce its orders. The day the amendments took effect, Atwood remained sentenced to ten years, with nine years, eleven months suspended, and five years of post-release supervision. The circuit court retained its sole authority to determine whether Atwood had violated a condition of his supervised release, as well as the power to revoke his term of supervision and to impose a period of imprisonment. The Legislature simply altered the term and place of imprisonment for certain violations."

- Circuit courts do not have inherent power to suspend a sentence or to impose a term of post-release supervision, nor do they have inherent power to revoke a term of post-release supervision and impose a period of imprisonment. This is a legislative function. The circuit court erred in finding the amendments unconstitutional.

Roby v. State, 183 So.3d 857 (January 28, 2016)



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News » REPORT: Three arrested in West Point stabbing

REPORT: Three arrested in West Point stabbing

Posted on October 29, 2012 by Chris Elkins in News

By West Point Daily Times Leader

On Saturday October 28 officers of the West Point Police Department responded to an E911 call to Stop One Deli on the corner of Division and Bugg Street, The Daily Times Leader reports.

Upon arrival officers discovered that a man had been involved in an altercation with three females and was suffering from a stab wound to the chest.

The victim, Marcus Payne, 27, of Hamilton, MS., was transported to the North Mississippi Medical Center in West Point but later died of his injuries while being transferred to the North Mississippi Medical Center in Tupel

Being held in the Clay County Jail pending charges of murde

27 yr. old Latwanna Santric Roby both of 7th Ave Macon, MS. and 22 yr. old Shunbrica Andrea Roby of Columbus, Ms.

Roby v. State, 183 So.3d 857 (January 28, 2016)

- Roby and two female cousins confronted Roby's boyfriend about him cheating on her. A fight ensued. As these things do, it escalated, and the boyfriend was stabbed to death.

- Roby was convicted of deliberate design murder.

Roby

- S-10 was an aiding and abetting instruction which included the language:

- ". . . Roby, together with [A] and/or [B], acted with a common design in committing an assault upon Marcus Payne and a homicide was committed by one of them while engaged in that assault, then all are criminally liable for that homicide[.]"

Roby

- The MSSC held that instruction to be error.
- The instruction indicated that the jury only needed to find Roby guilty, beyond a reasonable doubt, of assault, in order to find her criminally liable for the homicide.
- In order to render one responsible as an aider or abettor, it is essential that he share in the criminal intent of the direct actor. The conviction was reversed.

Green v. State, 183 So.3d 28 (January 28, 2016)

Green

- There was an outstanding warrant for Green's arrest. Police spotted him standing by a vehicle with the trunk open. Green noticed police, shut the trunk, and ran.

- Police towed the car. Subsequent to an inventory search, used the keys Green had thrown down, and found three guns in the trunk.

Green

- Green was charged with multiple counts of being a felon in possession of a firearm.

- In a case of first impression, the Supreme Court found that §97-37-5(1) allows for multiple convictions when more than one weapon is possessed simultaneously by a prior convicted felon. Not plain error, not double jeopardy

Warren v. State, 2013-CT-00926-SCT (Miss. March 31, 2016)

Warren v. State, 2013-CT-00926-SCT (Miss. March 31, 2016)

- Reversed a COA reversal.
- In a possession of a controlled substance in a correctional facility case, the indictment need not identify the controlled substance allegedly possessed.

Bester v. State, 2013-CT-00058-SCT (April 14, 2016)

- In the early 90's Bester plead guilty to rape and robbery and was sentenced to life by the trial court. In 2012, Bester filed a motion to correct his sentence, alleging that his sentence was illegal because a life sentence for forcible rape may only be imposed by the jury.

Bester

- The punishment for forcible rape is currently codified under §97-3-65(4)(a). The statute reads, in part, that the defendant "shall" be imprisoned for life if the jury so finds, but if the jury does not impose life, "…the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine."

- The SCT held that "any term" includes life imprisonment.

MSSC Quick hits

- ***Rowsey v. State***, No. 2014-KA-00501-SCT (Miss. December 3, 2015): a defendant does not waive his or her right to a speedy trial by failing to obtain a ruling on his or her motion for a speedy trial in the trial court. Overrules cases to the contrary.

- ***Flynt v. State***, No. 2013-KA-01973-SCT (Miss. October 22, 2015) - emphasizes need to raise speedy trial issues

- ***Hall v. State***, No. 2014-CA-01759-SCT (Miss. March 17, 2016) - Wrongful conviction complaint — the circuit court's finding that Hall had failed to establish his innocence as required by §11-44-7(1)(b), on the basis that the Order Passing to Inactive Files was neither a dismissal nor a nol pros pursuant to §11-44-3(1)(c), was error.)

MISSISSIPPI COURT OF APPEALS CASES

Mastin v. State, 180 So.3d 732 (November 17, 2015)

- At a driver's license checkpoint, Mastin's license was expired. The officer said Mastin yelled and screamed and refused to accept the ticket. Was arrested for disorderly conduct and resisting arrest.

- However, on cross, officer admitted that Mastin did take the ticket.

Mastin

- Assuming a command was given, it was a command to Mastin to take the ticket for driving with an expired license. According to testimony, Mastin took the ticket, albeit not without doing some cursing in the process. The command to take the ticket was not issued for the purpose of avoiding a breach of the peace, for at that point nothing had transpired that could be even remotely viewed as a brewing breach of the peace. The record did not support a finding that in ordering Mastin to accept the ticket, the officer was attempting to avoid a breach of the peace.

- "So when the officer arrested Mastin for disorderly conduct, Mastin had not refused an order or command by a law-enforcement officer to act or do, or refrain from acting or doing, something in order to prevent a breach of the peace."

- Because the evidence was insufficient to establish the legality of Mastin's arrest, it was also insufficient to establish that he resisted a lawful arrest.

Johnson v. State, 2014-KA-00664-COA (December 15, 2015)

- At Johnson's trial for aggravated domestic assault, the State offered four previous accusations of domestic violence against Johnson.
- The trial court admitted the reports without performing a 403 balancing test.
- COA found reversible error to not do so.
- Motion for Rehearing filed by the State.

McCollum v. State, 186 So.3d 948 (February 23, 2016)

- A few days before trial, McCollum's attorney was allowed to withdraw because McCollum had been difficult and had called him names.

- McCollum was told by the trial court he "waived" his right to an attorney, despite the fact that McCollum explicitly said he did not want his attorney to withdraw.

McCollum

- The Court of Appeals found error and reversed.
- In the absence of a prior warning, a defendant will not be found to have forfeited his right to counsel based on complaints about his appointed counsel.

COA Quick Hits

- *Sinko v. State*, No. 2015-CA-00107-COA (April 12, 2016) - offenders convicted of manufacturing prior to HB 585 are no longer parole ineligible based on the amendments adopted by HB 585. (Pending rehearing).

- *Harvey v. State*, No. 2013-KA-01758-COA (October 13, 2015) - firearm enhancement under §97-37-37(2) reversed and vacated where defendant also sentenced as an habitual. The mandatory maximum penalty provided by the habitual offender statute is "a greater minimum sentence" as provided by the statute. (Pending cert petition).

- *Wallace v. State*, 184 So.3d 993 (February 9, 2016) - "We are unaware of any authority that allows a circuit judge to revoke a defendant's bond based on the appearance that 'he was trifling with the court' or hesitating to plead guilty after filing a petition to do so." Also, there is no obligation for the court to accept a best interest plea under *Alford* – court needed to have evidentiary hearing where sworn affidavits alleged counsel failed to communicate an offer to plead guilty to the lesser offense.